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MICHAEL RODAK, JR., CLERK

No. 74-6008

IN THE SUPREME COURT OF THE UNITED STATES

Term,

JOHN MARTIN KURTZ,

Petitioner

v.

United States of America

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Daniel J. Ackerman
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Greensburg, Pennsylvania

Attorney for Petitioner

The petitioner, John Martin Kurtz, respectfully prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in these proceedings on January 27, 1975. This petition is made with respect to two appeals of the petitioner to the Court below at 74-1968 and 74-1969.

OPINIONS BELOW

There was no formal opinion rendered by the United States Court of Appeals or the District Court.

JURISDICTION

Final decrees of the Court of Appeals were entered January 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a defendant who has prior criminal convictions is denied due process by being compelled to

choose between not testifying or testifying at the cost of exposing to the finder of fact some or all of his prior convictions.

2. Whether a defendant who has prior criminal convictions is denied due process by any reference to prior convictions, arrests or difficulties with prosecutorial authorities.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The defendant in separate trials was convicted of two bank robberies while armed with a deadly weapon. In each

trial a co-defendant testified against the defendant. In the first trial the defendant elected to testify in his own behalf even though the trial court had ruled in a pretrial hearing pursuant to Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) that a 1958 conviction for burglary and a 1960 conviction for burglary, larceny and receiving stolen goods would be admissable against him for the purposes of impeachment should he testify. As stated, the defendant did testify in his first trial and the prior convictions were acknowledged by him in his direct testimony in an attempt to minimize their impact on the jury.

In the second trial, the defendant did not testify but his prior mis-conduct was alluded to by prosecution witnesses in the following manner:

a) The co-defendant in an unresponsive answer made reference to "the first bank robbery", thereby alerting the jury to the fact that these defendants had engaged in a prior robbery, and

b) a police officer testified "I have known John a long time" creating the inference that the defendant had a long and undesirable relationship with the police department.

REASONS FOR GRANTING THE WRIT

The doctrine which permits the introduction of prior crimes for the purpose of impeachment is based upon the assumption that the jury can and will, in accordance with the court's instructions, limit its consideration of the defendant's prior record to the issue of credibility alone. Mr. Justice Jackson put it in a famous phrase, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction". Krulewitch v. United States, 336 U.S. 440, 453, 93 L.Ed 790, 799, 69 S.Ct. 716 (concurring opinion) (1949).

In practice it appears that the assumption is in fact not true and juries are unable or unwilling to segregate evidence

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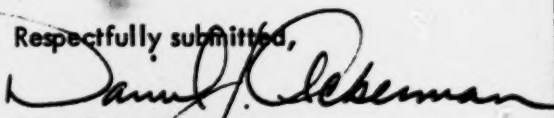
introduced for impeachment purposes from that introduced to prove guilt, Other Crimes Evidence at Trial: of Balancing and Other Matters, 70 Yale L J 763, 777 (1961).

Direct evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man", without regard to his guilt of the crime currently charged. Spencer v. Texas, 385 U.S. 554, 575, 17 L ed. 2d 606, 620, 87 S.Ct. 648 (concurring and dissenting opinions of Chief Justice Warren and Justice Fortas (1967). The petitioner urges your Honorable Court to proscribe the use of prior crimes as evidence for impeachment or any other purpose. The use of prior crimes for impeachment purposes effects an unwarranted and anomalous distinction between defendants with and those without criminal records in the exercise of the right to testify in their own behalf. Such distinction and use violates due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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